Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October Term, 1997

EDWARD A. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT SHOULD RESOLVE THE INTRA-CIRCUIT CONFLICT WHERE THE PANEL CLEARLY DEPARTED FROM UNITED STATES SUPREME COURT PRECEDENTS BY MISAPPLYING THE HARMLESS ERROR DOCTRINE TO A JURY INSTRUCTION THAT DIRECTED A VERDICT AGAINST THE APPELLANT ON AN ESSENTIAL ELEMENT OF THE CRIMINAL OFFENSES WHERE THE DEFENDANT HAS MADE A CONTEMPORANEOUS OBJECTION TO THE INSTRUCTION AT TRIAL?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

Barcella, Lawrence
Burr, Jorge
Cardoen, Carlos
Griffin, Ronald
Houlihan, Gerald J.
INDUSTRIAS CARDOEN LIMITADA
Johnson, Edward A
Keggereis, Sharon L
Linklater, W. Joseph
Londergan, Jim
McKenzie, John
O'Neill, Brian:
Palmer, Eduardo
Pena, Humberto J
Pollack, Thomas
Reetz, Ryan C.
Saffa, Franco
Scherker, Elliot H
SERVICIOS MAQUINARIAS E IMPEMENTOS, S.A. ("SMISA")
Shirley, Madeline
Strafer, G. Richard
SWISSCO Management Group, Inc.
Tamen, Frank
TELEDYNE INDUSTRIES, INC
TELEDYNE WAH CHANG ALBANY
Zuckerman, Roger

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OPINION BELOW

The April 28, 1998 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Johnson,* 139 F.3d 1359 (11th Cir. 1998). A copy of *Johnson* is attached as **APPENDIX A.**

JURISDICTION

The opinion of the Eleventh Circuit in Johnson was filed on April 28, 1998. The Eleventh Circuit denied rehearing on June 25, 1998. See **APPENDIX C.** This petition for a writ of certiorari follows within 90 days of the latter date. See Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Constitution, Amendments V. and VI.

STATEMENT OF THE CASE

A. Procedural History

On May 26, 1993, the appellant, Edward Johnson, was charged in 7 counts of multiple-count, multiple-defendant indictment. Count I charged Johnson, Johnson's employers (hereinafter "Teledyne"), Carlos Cardoen (a Chilean industrialist and arms manufacturer), and two of Cardoen's companies

with conspiring to: (1) make materially false statements to the Commerce Department, in violation of 18 U.S.C. § 1001, in connection with export license applications for zirconium metal; (2) exporting zirconium without obtaining licenses from the State Department, in violation of 22 U.S.C. § 2778; and (3) exporting zirconium to Chile, a country banned from receiving munitions exports from the United States under 50 U.S.C. § 2410. Johnson was also charged with substantive violations of Section 1001 (Counts V and VIII), Section 2410 (Count II) and Section 2778 (Counts III, IV and VI.) (R1-1.)

On April 4, 1995, the jury acquitted Johnson of Count II-IV but convicted him of the conspiracy charge (Count I), the two false statement charges (Counts V and VIII) and one export charge (Count VI). On August 7, 1995, the Honorable Shelby Highsmith sentenced Johnson to serve a total of 41 months in prison and to pay a fine of $25,000. (R7-553, 554.)

B. Statement of the Facts

For purposes of this Petition, Johnson adopts the "Fact" section of the Eleventh Circuit's decision in *United States v. Johnson,* 139 F.3d 1359 (11th Cir. 1998). **APPENDIX A**

C. The Eleventh Circuit's Decision

The Eleventh Circuit in *Johnson* rejected the argument that the district court's instruction in his case was *per se* reversible error. However, unlike the situation in the other *Johnson*, his trial attorney ***did*** preserve the instructional error for appellate review and because the district court did not merely fail to instruct the jury on an essential element. The district court in this case **directed a verdict** on that element, and Johnson specifically pointed out that the Eleventh Circuit

has repeatedly held that directing a verdict on an essential element can never be harmless error. *See, e.g., United States v. Rogers*, 94 F.3d 1519, 1526 n. 13 (11th Cir. 1996), *cert. granted*, 117 S.Ct. 1841 (1997), and *dismissed as improvidently granted*, 118 S.Ct. 673 (1998); *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1996); *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984).

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION BECAUSE DIRECTING A VERDICT ON AN ESSENTIAL ELEMENT IS NEVER HARMLESS UNDER BINDING SUPREME COURT AND ELEVENTH CIRCUIT PRECEDENTS AND THE PANEL CREATED AN INTRA-CIRCUIT CONFLICT BY MISAPPLYING THE HARMLESS ERROR DOCTRINE TO A JURY INSTRUCTION THAT DIRECTED A VERDICT AGAINST THE APPELLANT ON AN ESSENTIAL ELEMENT OF THE CRIMINAL OFFENCE.

A. Jury Instructions

Johnson submitted three written proposed jury instructions to the district court concerning the false statement charges. These instructions specifically requested that ***the jury*** be instructed and required to find, as essential elements of the Section 1001 charges in Counts I, V and VIII case, that the alleged "false statements" were "material" to the Commerce Department's decisions to grant the export licenses. The

proposed instructions also contained a definition of "materiality" for the jury to consider. *Id.*[1]

The district court refused to issue Johnson's requested instructions and, instead, instructed the jury -- consistent with then Eleventh Circuit practice --

> "that the issue of materiality is not submitted to you for your decision but is a matter to be determined by the Court." (1SR29: 4526.)

The district court then went one step further and ***directed a verdict*** on the "materiality" element of the Section 1001 charges by telling the jury:

> "You are ... instructed, that the alleged facts charged in the indictment as having been falsified would be material facts." *Id.*

Johnson objected to this instruction, stating that the issue of materiality was "an issue of fact for the jury." (1SR29: 4212.) However, the district court, refused to reconsider its ruling

B. The Panel Decision

After Johnson's trial, the United States Supreme Court changed the law and held that issues of "materiality" were

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[1]Johnson's submission of requested jury instructions on the issue of "materiality" was, standing alone, enough to preserve his objection for appeal. *United States v. Grigsby*, 111 F.3d 806, 814, n. 7 (11th Cir. 1997); *United States v. Morris*, 20 F.3d 1111, 1114 n. 3 (11th Cir. 1994).

issues of fact for juries to decide. *United States v. Gaudin*, 515 U.S. 506 (1995). The Supreme Court, however, did not consider or decide the type of harmless error review governing the instructional defect. While Johnson's appeal was pending, the United States Supreme Court also decided *United States v. Johnson*, 117 S.Ct. 1544 (1997). In *Johnson*, the Supreme Court held that a trial court's failure to *sua sponte* instruct a jury on the "materiality" element of a false statement charge -- *i.e.*, in the absence of any contemporaneous objection by defense counsel -- was not "plain error" under Fed. R. Crim. P. 52(b).

In his appeal, Johnson argued that the district court's instruction in his case was *per se* reversible error, because, unlike the situation in *Johnson*, his trial attorney ***did*** preserve the instructional error for appellate review and because the district court did not merely fail to instruct the jury on an essential element. The district court in this case directed a verdict on that element, and Johnson specifically pointed out that the Eleventh Circuit has repeatedly held that directing a verdict on an essential element can never be harmless error. *See, e.g., United States v. Rogers*, 94 F.3d 1519, 1526 n. 13 (11th Cir. 1996), *cert. granted*, 117 S.Ct. 1841 (1997), and *dismissed as improvidently granted*, 118 S.Ct. 673 (1998); *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1996); *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984).

On April 28, 1998, the Panel issued its opinion herein. *See* **APPENDIX A**. The Court rejected Johnson's arguments, holding that "a *Gaudin* error is subject to the harmless error standard of review." *Id.* at pp. 6-7, citing *United States v. Johnson*, 117 S.Ct. 1544 (1997), and *United States v. Fern*, 117 F.3d 1298 (11th Cir. 1997). *Fern*, like *Johnson*, was decided under a "plain error" standard of review. *See Fern*,

117 F.3d at 1307. And, neither *Fern*, *Johnson* nor the Panel opinion addressed the fact that the instruction in this case directed a verdict on an essential element and, hence, should have been *per se* reversible error under the Eleventh Circuit's prior decisions in *Rogers*, *Medina* and *Goetz*.

As demonstrated below, the "harmless error" standard employed by the Panel conflicts with the definition set forth in two decisions of the United States Supreme Court, and three decisions of the Eleventh Circuit Court of Appeals.

C. Supreme Court Precedents

Contrary to the reasoning employed by the Panel, the standard governing this case is not the "plain error" standard employed in *United States v. Johnson*, 117 S.Ct. 1544 (1997), to review mere instructional omissions, but by *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Yates v. Evatt*, 500 U.S. 391 (1991).

In *Yates*, 500 S.Ct. 391 (1991), the Supreme Court established the test for "harmless error" to a claimed error in a jury instruction which has been properly preserved for appellate review. The reviewing court must identify which facts the jury ***actually considered*** "in accordance with the instructions" given at trial. *Yates*, 500 U.S. at 404. Therefore, under *Yates*, when a trial court directs a verdict on an essential element of an offense, the error cannot be dismissed as harmless by reviewing the evidence under *Chapman v. California*, 386 U.S. 18 (1967). Since that evidence was never considered and no verdict thereon rendered by ***the jury***, *Chapman* is inapplicable.

The *Yates* method of applying harmless error to properly preserved objections to a jury instruction was confirmed by the Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275 (1993):

> Harmless-error review looks, we have said, to the basis on which "the jury ***actually rested its verdict,***" *Yates v. Evatt*, 500 U.S. ____, ____, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely attributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury trial guarantees. [Citations omitted.]

Sullivan, 508 U.S. at 280-81 (emphasis in original).

When jury instructions direct a verdict on an essential element of a crime, they necessarily deprive a defendant of his right to have the jury consider the evidence. Hence, such an error can never be harmless:

> The [right to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." [Citation omitted.] Thus, although a judge may direct a verdict for the defendant if the evidence is

> legally insufficient to establish guilt, ***he may not direct a verdict for the State, no matter how overwhelming the evidence***. [Citations omitted.]

Sullivan, 508 U.S. at 280-81 (emphasis added).

As in *Sullivan*, the jury in this case neither (1) considered the evidence as it related to the element of materiality nor (2) rendered a verdict on that element, because the court's instructions directed a verdict on that element. "Since, for the reasons describe above, there has been no jury verdict within the meaning of the Sixth Amendment" on the issue of materiality "the entire premise of *Chapman* [harmless error] review is simply absent." *Sullivan*, 508 U.S. at 280-81, citing *Chapman v. California*, 386 U.S. 18 (1987).

The 1997 decision in *United States v. Johnson*, 117 S.Ct. 1544 (1997), did not give the Panel the authority to depart from *Sullivan*. *Sullivan*, not *Johnson*, is the Supreme Court precedent most directly on point since *Sullivan* involved (1) a properly preserved objection (2) to an instruction which directed a verdict. The Supreme Court has cautioned Courts of Appeals that

> "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Rodriguez de Quijas v. Shearson/America Express, Inc., 490 U.S. 477, 484 (1989). This Court has repeatedly recognized this principle, noting that

> "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court."

Florida League of Professional Lobbyists v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996) (quoting *Rodriguez*), *cert. denied*, 117 S.Ct. 516 (1997). *Accord, Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 908 (11th Cir. 1997) (same).

The Supreme Court's decision in *Sullivan* "has direct application" to this case while the only similarity between this case and *Johnson* is that it involves the same element of the same crime. However, nothing in *Sullivan* or *Johnson* suggests that the ***nature of the crime or statutory element*** is determinative. On the contrary, the reasoning in *Johnson* was driven by the fact that there was no objection to lack of instruction on "materiality" and the apparent failure of Johnson to raise the directed verdict issue in the Supreme Court.

That the decision in *Johnson* did not determine the issue raised in this case is underscored by the Supreme Court's more recent ruling in *Rogers v. United States*, 118 S.Ct. 673 (1998). The Supreme Court in *Rogers* initially granted certiorari to review this Court's decision in *United States v. Rogers*, 94 F.3d 1519 (11th Cir. 1996), where the Court held that a ***preserved*** objection to a court's ***failure to instruct*** on an essential element could be subject to harmless

error review. As discussed more fully below, in so ruling, the Eleventh Circuit in *Rogers* expressly distinguished a mere "instructional omission" from a ***directed verdict*** which the Circuit Court acknowledged could never be harmless. *Rogers*, 94 F.3d at 1526 n. 13, citing *Rose v. Clark*, 478 U.S. 570, 578 (1986), and *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984).

The Supreme Court granted certiorari "to decide whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element." *Rogers*, 118 S.Ct. at 675; *id.*at 677 (O'Connor, J., and Scalia, J., concurring) (characterizing issue raised as "an important issue of constitutional law"). There is not the slightest hint in *Rogers* that the Supreme Court felt that this issue had ***already*** been resolved the previous term in *Johnson*. *See United States v. Ladish Malting Co.*, 135 F.3d 484, 491 (7th Cir. 1998) (recognizing that the Supreme Court "has twice recently noted ***but failed to resolve***" the issue of whether the removal of an element of an offense from a jury's consideration could ever be harmless, citing to *Johnson* and *Rogers*) (emphasis added). Certiorari was dismissed in *Rogers*, because the Court determined that the jury was, in fact, adequately instructed on the allegedly missing element.

D. The Eleventh Circuit Precedents

In determining and applying a definition of harmless error to directed verdicts which governs the Eleventh Circuit, the Panel was ***not*** writing on a clean slate. Its ruling not only departed from clear Supreme Court precedent but from clear, and binding, precedents of the Eleventh Circuit Court of Appeals.

As noted above, in *United States v. Rogers*, 94 F.3d 1519 (11th Cir. 1996), the Eleventh Circuit acknowledged the difference between a mere "instructional omission" and a directed verdict. Noting that the Court had already held, in *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984), "that it cannot be harmless when the trial court directs a verdict on an element of the crime charged," the Court "wholeheartedly" reaffirmed *Goetz* "as an accurate recitation of the law." *Rogers*, 94 F.3d at 1526 n. 13, citing *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"). *Accord, Roy v. Gomez*, 81 F.3d 863, 866-67 (9th Cir. 1996) (en banc) (distinguishing between situations where trial court merely omits an essential element from situation in *Gaudin* where court directs a verdict and entirely removes the element from the jury's consideration).

The Eleventh Circuit used the same analysis to reverse a drug conviction in *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1996). In that case, the district court removed from the jury's consideration a jurisdictional element for the defendant's prosecution for possession of cocaine on board a vessel subject to the jurisdiction of the United States. After the district court received a question from the jury about the jurisdiction issue, the district court's "response informed the jury that the matter of jurisdiction had been resolved by the court and was of no concern to them." *Medina*, 90 F.3d at 462. The Court found that the instruction directed a verdict on the jurisdictional element and reversed the defendant's conviction based on its holding in *Goetz*. The Court explained "[t]hat a trial judge cannot direct a verdict in favor of the government for all ***or even one element of a crime***." *Id.* at 464 (emphasis added, citing *Goetz*). "A directed verdict

in a criminal trial, ***either in whole or in part***, cannot be viewed as harmless error." *Id.* (emphasis added). *Accord, United States v. Wiles*, 102 F.3d 1043, 1060 (10th Cir. 1996) ("structural error can exist where a constitutional error affects a single element and causes the absence of a verdict on that element," *citing California v. Roy*, 117 S.Ct. 337, 339-40 (1996) (Scalia, J., concurring)), *rehearing granted in part and denied in part*, 106 F.3d 1516 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 363 (1998).

Thus, in *Rogers*, *Medina* and *Goetz*, the Eleventh Circuit either held outright (*Medina* and *Goetz*) or stated in strong dicta (*Rogers*) that directing a verdict on an element of an offense is *per se* reversible error. The Panel herein did not even cite much less recognize the binding nature of *Goetz* and *Medina*, despite the fact that *Goetz* had been "wholeheartedly" reaffirmed only a few months earlier "as an accurate recitation of the law." *See Rogers*, 94 F.3d at 1526.

As previously discussed, the intervening decision in *Johnson* did not address either the directed verdict issue or the effect on a contemporaneous objection to its analysis. When appellate courts determine the effect of an erroneous jury instruction which was *not* objected to at trial, reversal is permitted only for "plain error" under Fed. R. Crim. P. 52(b). By its own terms, "Rule 52(b) is permissive, not mandatory," and "the standard that should guide the exercise of remedial discretion under Rule 52(b)" is whether an error affected "substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, 507 U.S. 725, 735-36 (1993) (citation omitted). *Accord, Johnson*, 117 S.Ct. at 1547. In order to meet these burdens, the defendant must show that the error actually "affected the outcome of [her]

trial." *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996) (citing *Olano*). And, even if such a showing is made, an appellate court still has the discretion not to notice the error. *Kramer*, 73 F.3d at 1075 (citing *Olano*).[2]

All the post-*Gaudin* cases that the Eleventh Circuit has previously addressed, other than the instant one, have been decided under a "plain error" standard -- the standard requiring the defendants to show actual prejudice. *See, e.g., United States v. Frost*, Case No. 93-9382 (11th Cir. April 23, 1998), 1998 U.S. App. LEXIS 7835; *United States v. Fern*, 117 F.3d 1298 (11th Cir. 1997); *United States v. Calhoun*, 97 F.3d 518 (11th Cir. 1996); *United States v. Toussaint*, 84 F.3d 1406 (11th Cir. 1996); *Kramer*, 73 F.3d at 1074. In each of these cases, the Court either found that the defendants failed to show such prejudice or ruled that it was declining to reverse, in any event, under the discretionary prong of *Olano*.

Where the instructional error is objected to and involves the directing of a verdict on an element of an offense, *Medina* establishes that the Court has no discretion to excuse the error as "harmless." As in *Medina*, the Panel herein was required to apply the definition of "harmless error" found in *Yates* and *Sullivan* -- a definition which focuses on whether the jury ever considered the evidence and rendered a verdict on all elements of the offense based upon the instructions given by the district court. The Court in *Medina* properly applied *Yates* and *Sullivan*, as well as the

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[2] As the Supreme Court in *Olano* made clear, "a plain error affecting substantial rights does not, without more, satisfy the standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 U.S. at 737.

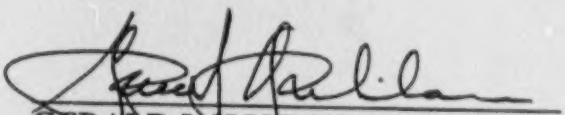
prior binding decision of the Eleventh Circuit in *Goetz*, and reached the correct result. The Panel in this case, however, mistakenly reviewed the instruction under a "plain error" standard -- hence, the Panel's reliance on *Johnson* and *Fern*. It then compounded that mistake by not following binding precedents in the Eleventh Circuit concerning the *per se* reversible nature of directed verdicts.

The Supreme Court in *Johnson* did not purport to decide: (1) whether ***directing a verdict*** on an essential element of an offense, such as "materiality", could ever be harmless; or (2) whether ***a contemporaneous objection*** to a "Gaudin" error of any kind (either eliminating "materiality" as an element or directing a verdict on it) could ever be harmless. Accordingly, the issue should be reviewed by the court. This case provides an appropriate vehicle upon which to establish and confirm the important issue of what standard of review governs a properly preserved objection to a directed verdict on an element of a criminal offense. The Supreme Court should resolve the issue.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



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